151 U.S. 362

TRANSCRIPT OF RECORD. CASE NO. 15255.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 885.

THE UNITED STATES, APPELLANT,

vs.

PHILIP R. ALGER.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 8, 1893.

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1 IN THE COURT OF CLAIMS.

PHILIP R. ALGER,
v.
THE UNITED STATES. } 16869.

I. *Petition filed January* 20, 1891.

To the honorable the chief justice and the associate justices of the Court of Claims:

The petition of Philip R. Alger respectfully shows to your honors that he is a citizen of the United States, and an officer of the Navy thereof, to wit, a professor of mathematics.

That he was appointed a cadet midshipman at large September 22, 1876; graduated June 22, 1882, and was promoted to midshipman the same day; that he was promoted to be an ensign the 26th of June, 1884; and that, while serving as an ensign, to wit, on the 10th day of November, 1890, his resignation as such was accepted to take effect from that date.

That on the 11th day of November, 1890, he was commissioned as professor of mathematics in the Navy, and that he accepted his appointment and executed, the required oath of office on the same day, and was confirmed by the Senate on the 13th of December, 1890.

That since the said 11th day of November, 1890, up to and including the 30th day of the said month, he has been allowed and paid at the rate of $2,400 per annum, being the shore pay of a professor of mathematics in the first five years after day of appointment. Claimant says that he should have been paid at the rate of $3,000 per annum for said period, being the pay of a professor of mathematics in the third five years from date of appointment, by reason of his prior service in the Navy,
2 to wit, from the 22d day of September, 1876, to the 10th day of November, 1890, by virtue of the provisions of the act of March 3, 1883.

Whereof claimant prays judgment in the sum of $32.87.

Claimant further says that he is the sole owner of this claim; that he has always been a loyal citizen of the United States, and that he has appointed John Paul Jones as his attorney.

PHILIP R. ALGER.
By JOHN PAUL JONES,
Attorney.

John Paul Jones, being first duly sworn, upon his oath says that he is the attorney for Philip R. Alger, and that the matters set forth in the foregoing petition are true to the best of his knowledge and belief.

JOHN PAUL JONES,
Attorney.

Subscribed and sworn to this 20th day of January, 1891.

JOS. W. AMAN,
Comm'r Ct. of Cls.

3 II. *Traverse filed January* 22, 1891.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

4 III. *Findings of fact and conclusion of law filed by the court December* 19, 1892.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. Claimant was appointed cadet midshipman September 22, 1876; graduated June 22, 1882, and promoted to midshipman the same day; commissioned ensign June 26, 1884. Resigned November 10, 1890, and resignation accepted to take effect the same day. November 11, 1890, appointed professor of mathematics, to rank from November 1, 1890; accepted the appointment and took the required oath of office the same day.

II. He was given credit upon his commission as ensign for his services as cadet midshipman, and as a midshipman and was paid the pay of an ensign after five years of service, from June 26, 1884, to the date of his resignation.

III. He has not been allowed credit under the act of March 3, 1883, (22 Stat. L., 473), in the lowest grade, having graduated pay since he entered the Navy as professor of mathematics by appointment as aforesaid

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover the sum of $32.87.

(The court filed no opinion in this case.)

5 IV. *Judgment of the court.*

PHILIP R. ALGER
vs.
THE UNITED STATES. } 16869.

At a Court of Claims held in the City of Washington on the 19th day of December, A. D. 1892, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Philip R. Alger,

claimant, do have and recover of and from the United States the sum of thirty-two dollars and eighty-seven cents.

BY THE COURT.

6 PHILIP R. ALGER
vs.
THE UNITED STATES. } No. 16869.

From the judgment rendered in the above-entitled cause on the 19th day of December, 1892, in favor of claimant, the defendants, by their Attorney-General, on the 31st day of January, 1893, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed in open court January 31, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.

7 IN THE COURT OF CLAIMS.

PHILIP R. ALGER
vs.
THE UNITED STATES. } No. 16869.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the judgment of the court, of the application of defendants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 6th day of February.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsed on cover:) Case No. 15255. Term No. 885. Court of Claims. The United States, appellant, vs. Philip R. Alger. Filed February 8, 1893.

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In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
v.
PHILIP R. ALGER. } No. 885.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT, v. PHILIP R. ALGER. } No. 885.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

September 22, 1876, claimant was appointed cadet midshipman in the United States Navy.

June 22, 1882, he graduated and was promoted to the grade of midshipman.

June 26, 1884, he was commissioned as ensign.

November 10, 1890, he resigned and his resignation was accepted the same day.

November 11, 1890, he was appointed professor of mathematics, to rank as such from November 1, 1890, and on said November 11 he accepted that appointment and took the oath of office.

The findings do not show any subsequent nomination to the Senate of the claimant for that office, nor that he accepted any other appointment or took any other oath of office.

From and including June 26, 1884, and up to the date of his resignation as ensign on November 11, 1890, claimant was given credit for the time he was at the Naval Academy as for actual service in the U. S. Navy; and he was paid during the whole of that period the "longevity" pay prescribed for an ensign after five years' service in that grade.

After said resignation of November 10, 1890, and up to November 30, 1890, he was allowed and paid at the rate of $2,400 per annum—that rate being the duty pay of a professor of mathematics in the U. S. Navy in the first five years after date of appointment. He now claims that he should have been allowed and paid at the rate of $3,000 per annum by reason of his prior service in the Navy, which began on September 22, 1876—that rate being the "longevity" duty pay prescribed by law for professors of mathematics during their third five years' service in that grade after date of appointment—and the court below decided as a conclusion of law that he was entitled to recover at the rate claimed, and gave him judgment for $32.87.

ASSIGNMENT OF ERRORS.

(1) The court below erred in its conclusion of law, on the facts found, that claimant was entitled to recover the said sum of $32.87.

(2) The court below erred in ordering, adjudging, and decreeing that said claimant should have and recover of and from the United States the sum of $32.87.

Argument.

The importance of this cause is not to be measured by the very trifling amount of the judgment, which is for extra pay for only a portion of a single month. Upon the decision of the Court of Claims some $2,000 of extra pay would now be due respondent, and his case is that of many others similarly situated, to whom, upon the same basis, very large amounts of money would be due.

This appeal should be considered in connection with the case of *United States* v. *Stahl*, No. 886, of present calendar, submitted herewith, which presents the exact converse of the question here arising.

This action arises under *Act of March* 3, 1883 (Stat. L. p. 473, ch. 97), and presents a question not yet passed on, often as that statute has demanded and received judicial construction. The act involved reads as follows:

> And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided further*, That nothing herein contained

shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy.

The lowest rank having graduated pay held by claimant was that of ensign, held from June 26, 1884, to November 10, 1890, in which rank he sought and received credit for his prior naval service from 1876, and accordingly was paid at the rate prescribed for ensigns after the first five years of service.

Having been promoted to the grade or position of professor of mathematics he seeks, by reason of the fact that on the day before his appointment he resigned his lower grade to again avail himself of his prior service, and to increase his pay to that of a professor in the third instead of the first five years after date of appointment. This he seeks to justify, as alone it can be justified, by the fact that his resignation from the lower grade, upon receiving the higher, constituted a departure from and a reentry into the naval service.

Such a result would obviously be an evasion and distortion of the purpose of the act of 1883. That was an act of grace, giving to those who had served previously a certain benefit from their prior service. It clearly was not intended to multiply that benefit to a man every time he changed his grade by promotion, and, if that were not its purpose, certainly the individual should not be permitted to secure that result by his own adroitness in performing the empty formality of resigning his lower grade upon receiving each higher one.

The act of 1883 gives to the officer this benefit from his prior service once, and carefully limits it to the lowest

graduated pay grade held by him since last entering the service. The expression "last entering the service" is obviously adopted to cover the cases of those who had been out of the service and returned to it, and to prevent uncertainty, if they happened to have held graduated pay grade, both in the prior service and in the later. It is, however, to be understood reasonably, and not technically, and to contemplate an actual departure from the service rendering an actual and not technical reëntry possible.

The petition states that "while serving as an ensign, to wit, on 10th day of November, 1890, claimant's resignation was accepted to take effect from that date; that on the 11th of November, 1890, he was commissioned as professor of mathematics in the Navy; and that he accepted his appointment and executed the required oath of office on the same day." The findings are in effect the same, to wit, that the resignation was on the 10th and the appointment as professor of mathematics was accepted the following day, the latter dating back as to rank "from November 1, 1890."

Under circumstances of this case there was no *break in claimant's service in the Navy* between September 22, 1876, and November 11, 1890. In other words, his service during that period was continuous without the interruption of a single day. And so it would no doubt be regarded in respect to rank and the retired list. During that entire period the claimant was in the military service of the United States and subject to the Articles for the Government of the Navy. Hence, when the court below found that he "resigned" on one day to take a

higher grade on the next, dating back to a time prior to his resignation, we can not understand that word to mean that claimant thereby intended to leave the service or ceased to be an officer in the Navy of the United States, or that his service ceased for a moment.

If, when an officer of the Navy is promoted to a higher grade, a practice exists of formally resigning his commission in the lower grade, that practice does not appear to be required by statute, and it would seem to be wholly unnecessary, because acceptance of the promotion vacates the lower office. The formality of resignation in no respect changes the condition of affairs.

It is familiar doctrine that a second commission issued under an appointment by and with the advice and consent of the Senate operates as a revocation of a former commission granted to the same officer in the recess of the Senate, which was to continue until the end of the next session of the Senate.

United States v. *Kirkpatrick*, 9 Wheat., 720.

Removal from office may be made in the same manner without the resignation of the incumbent.

> *Keyes* v. *United States*, 109 U. S., 336; *McElrath* v. *United States*, 102 U. S., 426; *Blake* v. *United States*, 103 U. S., 227; *United States* v. *Corson*, 114 U. S., 419.

We contend, therefore, that the resignation was a mere formality, that it did not cause any break in claimant's naval service, and that his acceptance of promotion to the grade or office of professor of mathematics was not a second entry into the service within the meaning of the act above cited.

During the period for which third lustrum pay of a professor of mathematics is demanded in this suit, claimant was an officer of the Navy, who had entered the service once only, and that once was his original entry as a cadet midshipman on September 22, 1876.

II.

In every case heretofore decided in this court under the act of 1883, that act has been applied retrospectively, the facts have not called for decision of the question whether it was intended to apply prospectively as well. Consideration of the purpose of the act, the conditions existing at its passage, and its peculiar phraseology would seem to limit it to entries into the service prior to passage of the act. The word "since" is extremely significant; it is only by distortion of its meaning that an event still in the future at the time of speaking can be said to be "since" a former date. If Congress, speaking in 1883, had intended to include a reentry into service which might occur in 1890, either the word *after* would have been substituted for the word *since*, or there would have been added, after the word service, "or after any future entry therein."

It is entirely clear that the act was intended to be retrospective. That purpose is indicated by the precautionary clause against increasing pay for services in volunteer Army or Navy, then nearly twenty years past. But it does not appear that it was intended to operate prospectively also. There is entire absence of alternative expressions to cover both past and future events. The objects

sought to be accomplished would be fully met by an exclusively retrospective construction. The Navy then contained many officers whose education had been gained in actual service during the rebellion, whose promotions had been won by gallantry, and whose abilities and skill established in the crucial test of actual war were being devoted to Government service in the regular Navy. These men were entitled to credit in some form of pay for their past service and experience, and the principal purpose of the act of 1883 was to provide therefor. Nearly twenty years had elapsed since the close of the war, and it might well have been assumed by Congress that all those who, having gone out of service at the close of the war, ever would return had already done so, and that the act need not provide for future reentries of that class.

The Stahl Case, together with this one, present for the first time, the questions whether or not the credit authorized by the act of 1883 for prior service can be repeatedly allowed, and whether each time an officer, by promotion, enters a new grade, he shall be entitled to credit therein for all prior service, if he is shrewd enough to accompany his promotion by the entirely needless formality of resignation. Both of these questions, we submit, should be answered in the negative and the judgment reversed.

J. E. DODGE,
Assistant Attorney-General.
FELIX BRANNIGAN,
Assistant Attorney.

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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, Appellant,
vs.
PHILIP R. ALGER, Appellee. } No. 885.

BRIEF FOR APPELLEE.

This case arises under what is known as the longevity pay clause of the naval appropriation act of March 3, 1883 (22 Stats., 473) which reads:

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy."

This clause has been many times before the Court of

Claims and this court. Its intention, apparent on its face, was to give officers of the Navy, at any time they might enter the service, credit for any prior service they might have had in the Army or Navy in computing their pay, as the same is graduated in the naval pay table found in Section 1556, Revised Statutes. Thus in the case of a professor of mathematics, which is the grade held by the appellee, the pay fixed in that section is increased $300 per annum for every five years of service and $500 per annum after fifteen years.

A person appointed professor of mathematics on the 11th of November, 1890 (when appellee was appointed) who had had no previous service in the Army or Navy, would, under this section, receive the initial pay of $2,400 per annum when on duty, and $1,500 on leave or waiting orders. But if he had served before such appointment (as the appellee did nearly) fifteen years, then, under the plain requirements of the act of 1883, he would become entitled to the highest rate of pay of his grade.

The policy, from the governmental standpoint, of giving credit for prior service (because of the value which previous experience would give to an officer's services in his new grade) is as obvious as the justice, from the standpoint of the officer, of his receiving such credit. But the theory of the defense in the court below seems to be that the legislation of 1883 was intended as a pure donation to officers then in the service, and not as compensation for valuable experience, or as an inducement to officers who had had such experience to re-enter the service.

On this theory it was insisted below that the claimant should not be credited on his grade of professor with all of his prior service, because he had once, when he became an ensign on the 26th of June, 1884, been credited on his grade of ensign with his previous service as a cadet. This credit, which the accounting officers were

bound to give him under the decisions of this court in U. S. *vs.* Baker (125 U. S., 646) and U. S. *vs.* Cook (128 U. S., 254) was styled by the defendants in the court below a "benefit"; and it was said that when the claimant had received this "benefit" in the period of his prior service, the act of 1883 was exhausted so far as he was concerned, and he could never again receive any "benefit" from its provisions.

This construction, we submit, is contrary both to the letter and the spirit of the act of 1883. That act, modifying section 1556, is a part of the permanent law of the land. Every officer appointed since 1883 to a grade in which the pay is graduated according to length of service has received credit in that grade for all prior services he may have rendered. Many officers have resigned since the act of 1883 was passed. Should the Government again need their services, as it would in case of war, and reappoint them to the Navy it seems almost too plain for argument that the act of 1883 would operate to increase their pay by reason of their previous service and give them the proper and just advantages, over such persons as might be appointed to the same grades from civil life, that Congress intended they should have.

The theory of longevity pay was well stated by the late Chief Justice of the Court of Claims in Thornley *vs.* The United States (18 Ct. of Cls., 111–117).

"There was, no doubt, an underlying principle and purpose in the introduction of longevity pay into the Navy. We think it was intended, first, to induce men to enter the Navy and remain in it for life; second, to remove the depressing influence of long periods of service in one grade without an increase of pay; third, to compensate for increased professional knowledge and efficiency in officers, by increasing their pay in advance of promotion. If these views are correct, the whole basis of longevity

pay is the officer's capacity for duty, and his performance of it. In other words, longevity pay is for longevity in actual service."

It should be remembered that officers who have once left the service do not re-enter it at will. They are not reappointed unless the government should need their services, and it may be safely said that an officer who has resigned and is again appointed must be regarded as having some special qualifications.

The act of 1883 plainly contemplates the case of an officer having two or more distinct periods of service, for it gives him credit upon the lowest grade held by him *since last entering the service.* The word *last* was introduced for the purpose of providing for such cases as this. Otherwise it would be superfluous and the clause should read "since entering the service." In Benjamin's case (10 Ct. of Cls., 474), it was held that the word "final" in the act of July 16, 1862 (12 Stats., 583), as qualifying the word examination, presupposed some other examination when this indication was borne out by the evidence.

A question was raised below as to whether there was in fact a re-entry into the service on the part of the appellee, his resignation as ensign having been accepted the day before his appointment as Professor; but we submit that it makes no difference whether the interval between such acceptance and appointment was a day or a year.

In Mimmock *vs.* The United States (97 U. S., 426) this court held that "the office became vacant when the incumbent was notified that his resignation had been accepted," and that the President could not, by revoking his acceptance, restore the officer.

This case affirmed the views of the Court of Claims in 10th Ct. of Cls., 584, and of the Attorney-General in 12 Ops., 555, and was followed by the case of Blake *vs.* The

United States (103 U. S., 227) in which the same doctrine was held.

From the facts here it is evident that the Government considered the services of Mr. Alger as especially desirable in the grade of professor of mathematics by reason of his training and experience, and the qualifications he had shown during his service in the line. There would seem to be every reason, in the interest of the Government itself, why such specially desirable service should be compensated by allowing him the credit which the act of 1883 so clearly requires.

Respectfully submitted.

JOHN PAUL JONES,
ROBT. B. LINES,
Counsel for Appellee.

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JAN 17 1894
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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, Appellant,
vs.
PHILIP R. ALGER, Appellee. } No. 885.

SUPPLEMENTAL BRIEF FOR APPELLEE.

The original brief for appellee in this case was furnished to appellant before appellant's brief was prepared. Counsel for appellee have now received the brief for appellant, and deem it necessary to call attention in this supplemental brief to what appears to be an important misapprehension of the methods of appointment to grades in the Navy.

It is not contended for the appellee that there should be a new computation for longevity pay every time an officer is "promoted" in regular course from one grade to another; but appellee's appointment as Professor of Mathematics was in no sense a promotion.

Officers of the Navy are, by the Revised Statutes (Title XV, chapter 1), divided into several corps, the line consisting of eleven grades from Admiral to Midshipman, and the staff embracing the Medical Corps, the Pay Corps,

Chaplains, Professors and Naval Constructors. In each of these corps promotion takes place from a lower to a higher grade. A transfer of an officer from the line to the staff is not a promotion, and the argument of appellant's brief, based on the supposition that it is such a promotion, is entirely untenable. Under the law and regulation, officers have a right, as vacancies occur in grades above them, to examination for promotion. No officer in the line has any such right to be examined for a commission in the staff. It was therefore necessary that appellee should vacate his position in the line, in order to be appointed a Professor of Mathematics, and his last appointment is in every way a new entry into the service, and as such within the spirit of the longevity pay clause of the act of 1883.

We ask the attention of the court to its reasoning in the case of United States *v.* Mullan (123 U. S., 186) not cited in our former brief, as conclusive of the questions involved in this case, and also in the case of United States *v.* Stahl, submitted herewith.

Respectfully submitted,

JOHN PAUL JONES,
ROBERT B. LINES,
For Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 885.

THE UNITED STATES, APPELLANT,

vs.

PHILIP R. ALGER.

APPEAL FROM THE COURT OF CLAIMS.

Application for a Rehearing, by William A. Maury, for Appellee and Others in Like Situation.

The undersigned, by permission of the appellee, Philip R. Alger, and his counsel, respectfully requests, in behalf of the appellee and the other officers of the navy who are affected by the recent decision of the Court in the above-entitled case, that the said case may be restored to the docket for oral argument and reconsideration, upon the grounds presented in the application for a rehearing in the case of The United States *vs.* Albert W. Stahl, which application is hereby specially referred to and adopted, in so far as applicable.

In this case the claimant was appointed cadet midshipman September 22, 1876; graduated June 22, 1882, and promoted to midshipman the same day; commissioned ensign June 26, 1884. He resigned November 10, 1890, and on November 11, 1890, was appointed professor of mathematics, to rank from November 1, 1890.

The claimant was given credit on his commission as ensign for his service as cadet midshipman and midshipman, and was paid the pay of an ensign after five years of service, from June 26, 1884, to the date of his resignation, but claims that he has not been allowed credit under the act of March 3, 1883, in the lowest grade, having graduated pay since he entered the navy as professor of mathematics.

The claimant sues for the pay of a professor of mathematics in the third five years from the date of appointment by reason of his prior service in the navy, to wit, from September 22, 1876, to November 10, 1890, by virtue of the provisions of the act of March 3, 1883, and the Court of Claims gave him judgment for the amount claimed, but this Court has reversed this judgment as erroneous.

The undersigned hereby certifies that he has carefully considered the questions involved in this case and the opinion of the Court, and is of the opinion that the case should be reheard, on the grounds stated in the application for a rehearing in the case of The United States *vs.* Albert W. Stahl.

WILLIAM A. MAURY,
Of Counsel, &c.

WASHINGTON, D. C., 1505 Pennsylvania avenue.